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MAIL DATE
December 14, 2001

Decision 01-12-022 December 11, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company For Approval of Leases to Allow CalPeak Power, LLC To Site Generator Plants on Utility Owned Land Adjacent To Substations.	Application 01-06-043 (Filed on June 25, 2001)

ORDER DENYING REHEARING OF DECISION 01-08-070

On September 6, 2001, Pacific Gas & Electric Company ("PG&E") filed an application for rehearing of Decision (D.) 01-08-070 ("CalPeak Decision"). PG&E also filed an application for rehearing on a related decision, D.01-08-069 ("Delta Project Decision"), which is the subject of a separate order today.

We have carefully considered all the arguments presented by PG&E and are of the opinion that good cause for rehearing has not been shown. We incorporate our discussion today in the Delta Project Decision, and conclude that no legal error has been demonstrated. We further deny PG&E's request to recategorize any further proceedings relating to our interpretation of General Order (G.O.) 69-C as a quasi-legislative proceeding. We also deny PG&E's request that we reconsider and vacate the Order to Show Cause issued on August 23, 2001 against PG&E.

PG&E's arguments focus on our interpretation of Public Utilities Code section 851 ("section 851") and G.O. 69-C. PG&E claims that the CalPeak Decision greatly limits the power that we gave to utilities under G.O. 69-C.

Essentially, PG&E argues that the CalPeak Decision contradicts both prior Commission decisions and the express language of G.O. 69-C. In fact, PG&E contends that the CalPeak Decision prohibits any type of construction work on utility property without section 851 approval. As a result, PG&E argues that we should have followed quasi-legislative procedures in the CalPeak Decision because the drastic change in the scope G.O. 69-C has industry-wide implications. PG&E also contends that, in the interest of fairness, since our previous stance on G.O. 69-C and section 851 has been ambiguous, sanctions are not appropriate. PG&E's arguments fail for several reasons.

The CalPeak Decision does not contradict prior Commission decisions. On the contrary, several recent Commission decisions support our position in the CalPeak Decision. We have noted our concern in recent decisions that utilities appear to be issuing licenses pursuant to G.O. 69-C with the intention of later converting that license into a long-term obligation. (See D.00-12-006, at 1, 7 ("Telecom"); D.01-01-043, at 10 ("Katella"); D.01-03-064, at 7-8 ("Storage Pro").) By doing so, utilities are not following the advance review requirements of section 851. While we approved the section 851 transactions at issue in those recent decisions, we did not condone the G.O. 69-C process utilized by the utilities. Specifically, in the Storage Pro Decision, we declared that "we wil1 deny future applications to encumber or dispose of utility property where the structure of the transaction was designed to circumvent the advance review requirements of § 851 or the appropriate environmental review." (Storage Pro, D. 01-03-064, at 1-2.) Therefore, PG&E's contention that the CalPeak Decision conflicts with prior Commission decisions is without merit.

PG&E's assertion that the CalPeak Decision contradicts the express language of G.O. 69-C is also erroneous. The language of G.O. 69-C does not state whether a utility issuing a license under the "limited uses" provision of G.O. 69-C may make permanent modifications to utility property. (Resolution No.

L-230 (July 10, 1985).) Therefore, we have the discretion to determine the scope of the application of "limited uses" in G.O. 69-C. As we have stated in prior decisions, undertaking a commitment with long term implications is not a "limited use" that qualifies for G.O. 69-C treatment. (See Telecom, D.00-12-006, at 7; Storage Pro, D.01-03-064, at 10.) In addition, contrary to PG&E's contention, the CalPeak Decision does not hold that minor site preparation work constitutes a permanent use that falls outside the scope of G.O. 69-C. Rather, we held in the CalPeak Decision and the related Delta Project Decision that utilities may not make permanent changes to utility property in anticipation of a section 851 application for a sale, lease or encumbrance of the property. (CalPeak, D.01-08-070, at 10; Delta Project, D.01-08-069, at 21-22.) Therefore, our interpretation of the scope G.O. 69-C does not contradict the language of G.O. 69-C.

PG&E also believes that we failed to provide it with notice and opportunity to comment, which is part of a quasi-legislative proceeding, as required under California law when we make new industry-wide policy. PG&E's argument is based on its assertion that the CalPeak Decision puts forth a new interpretation of G.O. 69-C that is inconsistent with our past decisions and with the language of G.O. 69-C. Thus, PG&E contends that we have repealed and reissued G.O. 69-C, an act that would affect all utilities under our jurisdiction. We did not repeal, amend or otherwise modify G.O. 69-C in the CalPeak Decision. Rather, we interpreted G.O. 69-C in a manner consistent with the language of G.O. 69-C and with recent Commission decisions. Therefore, PG&E's argument is without merit.

PG&E further argues that even if the Commission has the authority to amend G.O. 69-C in a ratesetting procedure, it should refrain from doing so. Essentially, PG&E believes that there should be a hearing before we make a "fundamental change in policy." (App. for Rehearing at 22.) We have already

exercised our discretion in determining that a ratesetting process is appropriate for the CalPeak case. In addition, we did not amend G.O. 69-C in the CalPeak Decision. Therefore, our decision to classify this proceeding as a ratesetting procedure does not constitute legal error.

Lastly, PG&E argues that an Order to Show Cause should not have been issued against PG&E for conduct that was acceptable in prior Commission decisions. We stated in previous decisions that we would no longer permit utilities to issue a license pursuant to G.O. 69-C with the intention of later selling, leasing or encumbering utility property. (See Telecom, D.00-12-006, at 7; Storage Pro, D.01-03-064, at 1-2.) Therefore, the Order to Show Cause does not violate the principles of fundamental unfairness. PG&E also contends that it may prevent the Commission from sanctioning PG&E under the doctrine of equitable estoppel. We have not yet sanctioned PG&E. Therefore, PG&E's equitable estoppel argument is premature. In any case, PG&E does not meet all of the requirements of the doctrine of equitable estoppel. PG&E was on notice of our prior decisions, where we warned utilities to follow the advance review requirements of section 851. (See D.99-08-007, at 1-2 ("Koch"); Telecom, D.00-12-006, at 1, 7; Storage Pro, D.01-03-06, at 1-2.) Therefore, we acted properly in issuing an Order to Show Cause.

No further discussion of PG&E's arguments is warranted.

Therefore IT IS ORDERED that:

1. Rehearing of D.01-08-070 is hereby denied.

This order is effective today.

Dated December 11, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

I dissent.

/s/ RICHARD A. BILAS
Commissioner